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In the Supreme Court of the United States

OCTOBER TERM, 1988

SOUTHERN NATURAL GAS COMPANY, PETITIONER

v.

JOSEPH F. FRITZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether the Supreme Court of Mississippi erred in failing to apply the Federal Energy Regulatory Commission's interpretation of a federal regulation concerning the contract price of natural gas, where compliance with that regulation was raised as a defense to the breach of contract action filed in state court.

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This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

This case stems from parallel proceedings before the Mississippi state courts and the Federal Energy Regulatory Commission (FERC or Commission) that have resulted in conflicting decisions. Those decisions involve the application of a Commission regulation to a dispute over a contract for the sale of natural gas between the purchaser, petitioner Southern Natural Gas Company, and the seller, respondents Joseph F. Fritz and Exxon Corporation.[1]

[1] Exxon Corporation was the original party to the contract. Exxon assigned its rights under the contract to Fritz, who in turn assigned interests to G.B. "Boots" Smith Corporation, Challenger Deep Well

The Supreme Court of Mississippi ultimately held that Section 270.207 of the Commission's Regulations, 18 C.F.R. 270.207, did not excuse Southern's breach of contract, and upheld an award of over $500,000 in damages. FERC, on the other hand, issued a declaratory order that Southern would have violated the federal regulation if it had paid the contract price. The validity of the Commission's declaratory order is currently pending before the Fifth Circuit on petitions for review filed by both Southern and Fritz.

1. In the National Gas Policy Act of 1978 (NGPA or Act), 15 U.S.C. 3301 *et seq.*, Congress "comprehensively and dramatically changed the method of pricing [the wellhead sales of] natural gas produced in the United States." *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 322 (1983). Title I of the NGPA, 15 U.S.C. 3311-3320, 3331-3333, "establishes an exhaustive categorization of natural gas production, and sets forth a methodology for calculating an appropriate ceiling price within each category." *Mid-Louisiana Gas*, 463 U.S. at 332. Under Subtitle A of Title I, 15 U.S.C. 3311-3320, those price ceilings gradually increase over time. See *FERC* v. *Martin Exploration Management Co.*, No. 87-363 (May 31, 1988), slip op. 2. Subtitle B of Title I, 15 U.S.C. 3331-3333, however, "establishes a three-stage elimination of price ceilings for certain categories: the price ceilings for certain 'high-cost' gas were eliminated in 1979, for certain 'old' interstate gas and 'new' gas in 1985, and for certain other 'new' gas in 1987." *Martin Exploration Management*, slip op. 2. In other words, the NGPA called for the deregulation of substantial categories of natural gas within the decade.

Services, Inc., and H. Lanier B. Foote. Pet. App. 3a-4a, 32a-33a. All five parties are respondents in this case. Fritz initiated the action in state court; we will therefore collectively refer to the respondents as either Fritz or respondent.

In order to ensure compliance with the regime established under the NGPA, Congress, in Section 504(a)(1) of the Act, 15 U.S.C. 3414(a)(1), made it unlawful for any person "to sell natural gas at a first sale price in excess of any applicable maximum lawful price under [the NGPA]."[2] Congress specifically conferred on FERC such general rulemaking authority "as [FERC] may find necessary or appropriate to carry out its functions under [the NGPA]" (§ 501(a) of the Act, 15 U.S.C. 3411(a)). Congress also empowered FERC, "whenever it appears to the Commission that any person is engaged or about to engage in any act or practice which constitutes or will constitute a violation of [the NGPA], or any rule or order thereunder," to bring an action in an appropriate United States District Court to enjoin the illegal practice and enforce compliance with the NGPA (§ 504(b)(1) of the Act, 15 U.S.C. 3414(b)(1)).[3]

2. In 1980, FERC promulgated a rule as part of its continuing efforts to enforce compliance with the price ceilings established under the NGPA and the prohibition of Section 504(a)(1).[4] That rule, currently codified as Section 270.207 of the Commission's Regulations, 18 C.F.R. 270.207 (Regulation 270.207), provides that "[n]o portion of the price paid for the first sale of deregulated natural

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[2] See H.R. Conf. Rep. No. 1752, 95th Cong., 2d Sess. 74 (1978) ("The rule for application of ceiling prices pertains to maximum lawful prices. All maximum lawful prices are ceiling prices only. In no case may a seller receive a higher price than his contract permits.").

[3] The NGPA also authorizes FERC to assess civil penalties for violations of the Act. If contested, those assessments are subject to judicial review in an appropriate United States District Court. Section 504(b)(6)(A), (E), (F) of the Act, 15 U.S.C. 3414(b)(6)(A), (E), (F).

[4] See Order No. 78, *Final Rule Defining and Deregulating Certain High-Cost Gas*, No. RM79-44, F.E.R.C. Stats. & Regs. ¶ 30,147 (1980).

gas * * * may represent consideration for the sale of natural gas which is not deregulated natural gas." FERC announced that in order to prevent parties from structuring transactions to evade maximum lawful prices, the Commission "would consider sales in which part of the price paid for deregulated high-cost gas was paid as compensation for the sale of price-regulated gas to be circumventing applicable maximum lawful prices."[5]

FERC first applied Regulation 270.207 in a case involving a contract amendment between Exxon Corporation and Columbia Gas Transmission Corporation. See *Columbia Gas Transmission Corp.*, 22 F.E.R.C. ¶ 63,093 (1982). That amendment authorized Exxon to obtain the highest price available under a favored nations clause for the sale of certain deregulated gas in return for Exxon's agreement to sell regulated reserves or gas to Columbia at the maximum lawful price. A Commission Administrative Law Judge (ALJ) found that Columbia had agreed to the additional deregulated pricing option in order to obtain the dedication of additional reserves of price-regulated gas. The ALJ accordingly concluded that the contractual arrangement violated Regulation 270.207 because it effectively raised the price of the regulated gas above the maximum lawful price. 22 F.E.R.C. ¶ 63,093, at 65,351-65,353. The Commission affirmed the ALJ's ruling that the contract violated Regulation 270.207, but on rehearing remanded the case to allow the ALJ to identify the specific volumes of allegedly overpriced gas and to determine if Exxon had received a higher price for the gas than it otherwise would have received. *Columbia Gas*

[5] Order No. 78, *supra*, at F.E.R.C. Stats. & Regs. ¶ 30,147, at 31,013.

Transmission Corp., 26 F.E.R.C. ¶ 61,034, at 61,122, on reh'g, 26 F.E.R.C. ¶ 61,334, at 61,730 (1984).[6]

3. The initial Commission proceedings in the *Columbia Gas* case prompted the contractual dispute between petitioner, Southern Natural Gas Company, and respondent, Joseph F. Fritz.

a. In 1951, Southern entered into a contract with Exxon Corporation's predecessor in interest, Humble Oil & Refining Company, for the sale of natural gas. Southern agreed to purchase gas produced by Humble Oil from the Sandy Hook Field located in Mississippi and Louisiana. In early 1978, Exxon discovered gas in the Mississippi Canyon area of off-shore Louisiana. Later in the year, Exxon and Southern agreed to "upgrade and modernize" various contracts, which included adding provisions for Exxon to sell its Mississippi Canyon gas to Southern (Pet. App. 3a). Southern and Exxon amended the 1951 contract in 1979. Under the 1979 amendment, Southern agreed to pay Exxon a rate for gas production on certain onshore property (Sandy Hook Gas) no lower than the applicable NGPA lawful price. If that gas were later deregulated, Southern would pay Exxon the average of the three highest prices Southern paid its non-affiliated producers

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[6] On remand, the ALJ confirmed the violation of Regulation 270.207, calculated the amount of the violation, and ordered a refund. *Columbia Gas Transmission Corp.*, 28 F.E.R.C. ¶ 63,005, at 65,044-65,046, 65,051 (1984). Thereafter, Exxon and Columbia filed with the Commission a settlement agreement under which Exxon would refund certain monies to Columbia, which the pipeline would then pass through to its customers. Under this agreement, neither Exxon nor Columbia admitted to a violation of the NGPA. The Commission approved this uncontested settlement in 1987. *Columbia Gas Transmission Corp.*, 39 F.E.R.C. ¶ 61,245 (1987).

for deregulated gas in the same area.[7] In partial consideration for this new pricing provision, Exxon agreed to dedicate certain price-regulated gas from the Mississippi Canyon to Southern. *Id.* at 2a-4a, 32a.

b. In January 1980, Exxon began drilling operations for Sandy Hook Gas (Unit 27, Well No. 1) on lands covered by the 1979 contract amendment. Exxon was unable to complete the well as a producer, and entered into a "farm-out" agreement with respondent, Joseph F. Fritz.[8] Under that agreement, Fritz would earn an assignment of leases from Exxon if he completed the well as a productive unit. In January 1983, after Fritz had completed the well at a depth of over 15,300 feet, Exxon assigned its working interest in the well to Fritz. Exxon reserved an overriding royalty interest in the gas produced from the well and the right to exchange that interest for the working interest upon payout. The assignment was made subject to Exxon's contract with Southern, as amended in 1979, which, as mentioned above, entitled Southern to purchase from Exxon certain quantities of regulated Mississippi Canyon gas. Pet. App. 3a-4a, 32a-33a.

By January 1983, the State of Mississippi had issued its final determination that the gas produced from Fritz's

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[7] This favored nations clause contained a pricing limit, stating that the price may never increase above the cost of a competing fuel, No. 2 fuel oil (Pet. App. 4a n.1).

When the parties amended the contract in 1979, Exxon was not selling Southern any deregulated gas from the Sandy Hook Field (Pet. App. 32a).

[8] Fritz had been in charge of Exxon's drilling operations since May 1981. In his efforts to complete the well, which included rebuilding the well casing at a cost of $5 million, Fritz was joined by respondents G.B. "Boots" Smith Corporation, Challenger Deep Well Services, Inc., and H. Lanier B. Foote. Pet. App. 3a, 33a nn. 5-6.

deep well qualified as "high-cost natural gas," a deregulated gas category under Section 107(c)(1) of the NGPA, 15 U.S.C. 3317(c)(1). In February 1983, Fritz entered into an adoption and ratification agreement with Southern under which Fritz became a party to the contract between Exxon and Southern, which included the 1979 amendment. Pet. App. 3a, 33a.

c. After learning of the ALJ's application of Regulation 270.207 to the contract amendment in *Columbia Gas Transmission Corp., supra*, Southern notified Fritz in March 1983 that Southern might violate the NGPA and Regulation 270.207 if it paid the deregulated price for gas as set forth in the 1979 amendment (A.R. 19-20).[9] Instead of paying Fritz the deregulated price, Southern chose to pay the lower regulated price under an alternative pricing formula set out in the amendment. Southern, however, offered to put the difference in escrow pending FERC's determination whether the 1979 amendment violated Regulation 270.207.[10] Fritz responded in May 1983 by filing an action against Southern for breach of contract in the Circuit Court of Marion County, Mississippi. Exxon later intervened in that action in support of Fritz. Pet. App. 4a, 34a; A.R. 1-3, 21-22.

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[9] "A.R." refers to the Abstract of Record filed with petitioner's brief in the Mississippi Supreme Court.

[10] The 1979 amendment contains no provision regarding placing disputed payments in escrow. The contract, however, does contain a specific mechanism governing the refund of disputed payments. Article 7, Section 6 provides in pertinent part (1 R. 26):

> If the Federal Energy Regulatory Commission * * * should at any time determine by final, nonappealable order that amounts paid by Buyer to Seller * * * are not just and reasonable, or disallow inclusion in Buyer's resale rates of any amounts paid by Buyer to Seller under this Article 7, then Seller shall refund to Buyer such amounts so paid and disallowed or determined not to be just and reasonable * * *.

d. On June 30, 1983, Southern filed a petition for a declaratory order with FERC seeking the Commission's ruling on whether Regulation 270.207 prohibited Southern from paying Fritz the deregulated contract price. Both Fritz and Exxon sought leave to intervene which was not opposed. In the meantime, Southern answered Fritz's breach of contract action in the state trial court. Southern asserted that payment of the deregulated contract price might violate the NGPA, as construed by FERC in Regulation 270.207, and maintained that resolution of the dispositive issue was within the primary jurisdiction of the Commission. Pet. App. 25a, 31a; A.R. 5-6.[11]

4. In November 1983 and then again in March 1984, the state trial court denied Southern's motion to stay the case pending FERC's declaratory ruling (Pet. App. 29a, 30a).[12] After holding a hearing on cross-motions for summary judgment, the state trial court, in July 1984, granted Fritz's motion for partial summary judgment, holding Southern liable for breach of contract (Pet. App. 24a-28a; A.R. 5-6). The court found that "the intent of all parties was for the producer to receive the deregulated price" (Pet. App. 25a). Since the gas was being produced from a deep well no longer subject to FERC regulation, the court concluded that "under the present state of the law there is no question that the price to be paid [Fritz] is the deregulated price" (*ibid.*).

Turning to Southern's federal defense, the court interpreted Regulation 270.207, as applied in *Columbia Gas Transmission Corp., supra,* to require that "no portion

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[11] On June 15, 1983, Southern sought to remove the state court action to federal court. The district court, however, remanded the case to the state trial court on September 5, 1983. A.R. 2.

[12] On January 18, 1984, Southern had requested that FERC expedite consideration of its petition (Pet. App. 10a).

of the price for deregulated high cost gas may represent consideration for the sale of other gas" (Pet. App. 24a). The court found (*id.* at 26a) that:

> there is no factual connection which would allow Mississippi Canyon gas to be related to the decontrolled gas beneath 15,000 feet and that there were no other interrelationships or considerations which would actually effect [*sic*] the price to be paid for gas produced below this depth under the contracts in question.

The court thus concluded that Southern's defense failed because payment of the deregulated contract price would not have violated Regulation 270.207. Finally, the court distinguished *Columbia Gas* on three grounds: that case involved the sale of both regulated and deregulated gas, whereas Fritz sold only deregulated gas; Regulation 270.207 was not made effective until after the parties had agreed to the 1979 contract amendment; and the Exxon and Fritz contracts with Southern had been treated by FERC as two separate contracts, while "Exxon had not directly participated in or significantly benefited from the Fritz operation [selling only deregulated gas]" (Pet. App. 26a).

On September 1, 1984, after holding another hearing concerning damages, the court awarded Fritz contract damages of roughly $786,000, and an additional $95,000 in interest and $150,000 in attorney's fees (Pet. App. 19a-23a).

5. On August 5, 1987, the Supreme Court of Mississippi affirmed in part and reversed in part (Pet. App. 1a-17a).[13] The court agreed with both the trial court's

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[13] The Mississippi Supreme Court reversed the trial court's award of roughly $280,000 in damages representing retroactive payments for

analysis distinguishing *Columbia Gas* and that court's conclusion that Regulation 270.207 does not prohibit Southern from paying the deregulated contract price. Since "Southern concedes that, except for the § 270.207 rule, the contract is binding upon it," the court upheld the grant of summary judgment (Pet. App. 8a). The court also rejected Southern's argument that the case should have been stayed pending the outcome of FERC's proceeding. The court noted that FERC had not yet acted on Southern's petition "although four years have expired since the petition was filed" (*id.* at 10a). In the court's view, "[e]ntering a stay for the FERC to exercise primary jurisdiction would be the equivalent of sending the case to the graveyard" (*id.* at 11a).

Southern and Fritz each filed timely petitions for rehearing.

6. While those petitions were pending before the Mississippi Supreme Court, the Commission issued its "Declaratory Order" on Southern's original petition. *Southern Natural Gas Co.*, No. GP83-35-000, 40 F.E.R.C. ¶ 61,225 (Sept. 11, 1987) (Pet. App. 31a-38a). Expressly disagreeing with the reasoning and holdings of the Mississippi state courts, the Commission ruled that Regulation 270.207 prohibited Southern from paying Fritz the deregulated contract price. In the Commission's view, *Columbia Gas* itself "makes very clear that a violation of section 270.207 would occur where the parties have 'explicitly tied the alternative pricing provision for unregulated gas to the commitment of regulated gas' " (Pet. App. 35a-36a (footnote omitted)). Here, "[t]he inclusion of the favored nations clause in the Exxon/Southern contract was specifically tied to the dedication by Exxon

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deregulated gas and that court's award of $150,000 in attorney's fees. The court also reduced the lower court's award of ten percent interest to six percent. Pet. App. 11a-14a.

of additional regulated reserves to Southern" (*id.* at 36a). This fact made the case "indistinguishable" from *Columbia Gas.* As the Commission explained (*ibid.*):

> [E]ven though no regulated gas is covered by the Fritz/Southern agreement, which concerns sales of deregulated gas from the Sandy Hook Gas Unit 27, Well No. 1, the payment of the contract price to Fritz would violate [Regulation 270.207] because the payment of the deregulated rate would represent consideration for the dedication by Exxon to Southern of additional jurisdictional reserves.

7. Southern promptly notified the Mississippi Supreme Court of FERC's ruling and requested that the court give it " 'controlling weight' " (Pet. 11). On April 27, 1988, the Mississippi Supreme Court denied the petitions for rehearing without commenting on FERC's recent order (Pet. App. 18a).

8. After the final disposition of the case by the Mississippi Supreme Court, the Commission denied petitions for rehearing in its proceeding. *Southern Natural Gas Co.*, Nos. GP83-35-001 and GP83-35-002, 43 F.E.R.C. ¶ 61,454 (June 6, 1988) (Pet. App. 39-45a). The Commission rejected Fritz's contention that it lacked jurisdiction over the entire matter, concluding that "where the sales of regulated and deregulated gas are inextricably coupled the Commission does have jurisdiction, and can prohibit Southern from making payments to Fritz where those payments would result in the circumvention of the maximum lawful price ceilings of Title I of the NGPA" (*id.* at 42a). The Commission also stressed that it was not bound by the Mississippi Supreme Court's interpretation of the agency's regulation, even though that interpretation was embodied in a final judgment between the parties (*id.* at 42a-43a). Finally, in response to Southern's concerns,

the Commission clarified remarks in its initial order that had suggested that Fritz should be paid according to a certain pricing scheme (see *id.* at 37a-38a). The Commission announced that its "statement was not intended to instruct the Mississippi courts on how to reconstruct the contract in the absence of the offending language" (*id.* at 44a).

Southern and Fritz have each filed petitions for review of the Commission's ruling in the Fifth Circuit. *Fritz* v. *FERC*, No. 88-4410. Briefing was completed in mid-January 1989. Oral argument has not yet been scheduled.

DISCUSSION

This case raises an issue concerning the deference that a state court owes to FERC's interpretation of its own regulation, where compliance with that regulation is raised as a defense to a breach of contract action filed in state court. In our view, the Mississippi Supreme Court erred in not deferring to FERC's construction of the federal regulation, an error that has subjected petitioner to apparently conflicting obligations. The question presented, however, does not independently merit the Court's plenary review. We therefore recommend that the Court grant certiorari, vacate the judgment, and remand the case to the Mississippi Supreme Court for further consideration in light of FERC's declaratory order. Alternatively, if the Court is not inclined to order summary disposition, the Court should either deny the petition now or hold the petition pending the Fifth Circuit's decision in *Fritz* v. *FERC*, *supra*.

1. Under the regime established in the NGPA, FERC exercises exclusive authority to determine and enforce first-sale price ceilings for natural gas. *E.g.*, *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474

U.S. 409, 420-421 (1986); see *Schneidewind* v. *ANR Pipeline Co.*, No. 86-986 (Mar. 22, 1988), slip op. 7 & n.6.[14] FERC, in the exercise of that authority,[15] promulgated Commission Regulation 270.207, a rule proscribing transactions structured to evade the statutory maximum lawful prices, namely, those "in which part of the price paid for deregulated high-cost gas was paid as compensation for the sale of price-regulated gas * * *" (Order No. 78, at F.E.R.C. Stats. & Regs. ¶ 30,147, at 31,013). The Commission thus acted within its statutory jurisdiction when it considered Southern's request for a declaratory ruling and ultimately decided that Regulation 270.207 would prohibit Southern from paying Fritz the deregulated contract price.[16]

Where, as here, a federal agency validly rules on issues within its statutory jurisdiction, state courts are not free to disregard that authoritative decision. See *Mississippi Power & Light Co.* v. *Mississippi*, No. 86-1970 (June 24,

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[14] Section 504(a)(1) of the NGPA, 15 U.S.C. 3414(a)(1), prohibits any person from selling natural gas at a first sale price in excess of the maximum lawful price established under the Act; Section 504(b)(1) of the NGPA, 15 U.S.C. 3414(b)(1), empowers the Commission to institute appropriate enforcement proceedings in federal court.

[15] Under Section 501(a) of the Act, 15 U.S.C. 3411(a), FERC also has general authority to prescribe "such rules and orders as it may find necessary or appropriate to carry out its functions * * *." See *FERC* v. *Martin Exploration Management Co.*, No. 87-363 (May 31, 1988), slip op. 8.

[16] The Commission has no jurisdiction over contracts involving only deregulated gas under Section 601 of the NGPA, 15 U.S.C. 3431. See *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 380-381 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982). Where, however, FERC finds that "sales of regulated gas and deregulated gas are inextricably coupled" (Pet. App. 42a), FERC properly exercises its regulatory jurisdiction to ensure that consideration for the sale of regulated gas does not exceed the statutory maximum lawful price.

1988), slip op. 16-17; *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 578-582 (1981); *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981). Indeed, the established principle that a court should defer to an agency's interpretation of its own regulation applies with even greater force where the agency has construed its regulation within a factual context similar to that pending before the court. Cf. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Given the Commission's delay in issuing its declaratory order, the Mississippi state courts may have been reluctant to refer the interpretative issue to FERC under the primary jurisdiction doctrine.[17] That hesitation,

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[17] The doctrine of primary jurisdiction promotes "proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63 (1956). The Court has thus recognized that

> [e]ven when common-law rights and remedies survive and the agency in question lacks the power to confer immunity from common-law liability, it may be appropriate to refer specific issues to an agency for initial determination where that procedure would secure "[u]niformity and consistency in the regulation of business entrusted to a particular agency".

Nader v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 303-304 (1976) (quoting *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952)). Nevertheless, in invoking the doctrine of primary jurisdiction, which inevitably delays pending litigation, "the court must always balance the benefits of seeking the agency's aid with the need to resolve disputes fairly yet as expeditiously as possible." *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.*, 532 F.2d 412, 419 (5th Cir. 1976), cert. denied, 429 U.S. 1094 (1977).

In this case, Southern's petition for a declaratory ruling remained pending before FERC for over four years. Given the Commission's inaction, neither the state trial court nor the Mississippi Supreme Court are readily at fault for choosing not to refer the issue concerning the proper interpretation of Regulation 270.207 to FERC.

however, does not mean that Mississippi Supreme Court was free to ignore the Commission's decision once it is issued. In sum, that court plainly erred by not deferring to FERC's interpretation of Regulation 270.207.

2. Nevertheless, we do not believe that the question presented by this petition – whether the state court erred in refusing to follow FERC's ruling – merits the Court's plenary review. This case does touch upon potentially substantial federal issues, including whether FERC has statutory authority to promulgate Regulation 270.207 and to apply that regulation to contracts involving sales of regulated and deregulated gas. Those issues, however, are properly presented in the case pending before the Fifth Circuit, *Fritz* v. *FERC, supra,* and that case, not the instant petition, would be the proper vehicle for this Court to address those questions.

To be sure, the instant proceedings confront petitioner with potentially conflicting obligations as a result of the state court judgment and FERC's order. That conflict assumes real significance for Southern, however, only if the Fifth Circuit ultimately upholds FERC's order in its entirety. Moreover, even if FERC's order is ultimately upheld, the Commission has discretion whether or not to institute enforcement proceedings against petitioner for complying with the state court's mandate. Any enforcement action undertaken by the Commission would involve consideration of a number of factors, including the relative fault of all the contracting parties, the extent to which the contract price exceeded the maximum lawful price, the actual beneficiaries of the windfall, and the unusual nature of the protracted proceedings themselves.[18]

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[18] Similar considerations apply to Southern's concern (Pet. 19) that compliance with the Mississippi Supreme Court's judgment will

In other words, Southern's complaint that it is " 'caught between a rock and hard place' " may be both overstated and premature (Pet. 18).

In any event, Southern cannot avoid all responsibility for the situation in which it finds itself. The 1979 contract amendment specifically provided a mechanism by which Southern could avoid potentially inconsistent obligations by paying the contract price and demanding a refund should FERC later rule that those payments violated the NGPA. See note 10, *supra*. As Southern concedes, "the parties clearly contemplated a refund by Fritz to Southern in the event the FERC disallowed pass through of amounts previously paid by Southern to Fritz" (Pet. 20). That Southern chose to avoid this provision, allegedly because of Fritz's financial condition, suggests at most that the contract was inartfully drafted, not that Southern should be able to take steps outside the contract without risk.[19]

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result in the Commission's refusing to allow the firm to pass those costs through to its customers as part of Southern's filed resale rates. Southern also ignores the fact that the Commission's ruling would conceivably disallow only that *portion* of the deregulated contract price found to represent the consideration for the dedication of regulated reserves.

[19] The record suggests an additional reason militating against plenary review. The state trial court found that "the intent of all parties was for the producer [Fritz] to receive the deregulated price" (Pet. App. 25a), and the Mississippi Supreme Court observed that "[t]he deregulated price which was payable under the [1979] amendment was the same deregulated price which Southern was then paying and offering to other producers of deregulated gas, and, in some cases, was even less than the deregulated price which Southern was paying and offering other producers for deregulated gas" (*id.* at 8a). FERC itself recognized that "Fritz is entitled to receive compensation for the sale of his gas" (*id.* at 37a; see *id.* at 44a), and suggested that the price Southern had paid for comparable purchases of deregulated gas might be the correct figure (*id.* at 37a-38a, 44a). Consequently, assuming

In sum, the case in its present posture presents no important and unresolved question of federal law, and the apparent harshness of subjecting petitioner to potentially conflicting obligations is less serious than may appear upon initial examination. Plenary review by this court is therefore unwarranted.

3. In our view the preferred disposition would be for the Court to grant the petition, and vacate and remand the judgment of the Mississippi Supreme Court for further consideration in light of the Commission's declaratory order in *Southern Natural Gas Co.*, No. GP83-35-000, 40 F.E.R.C. ¶ 61,225 (1987), reh'g denied, 43 F.E.R.C. ¶ 61,454 (1988). As shown above, established precedent easily resolves the question petitioner presents, namely, whether the state court erred in refusing to defer to FERC's ruling (see Pet. i).[20] And although FERC's declaratory order was brought to the attention of the Mississippi Supreme Court on rehearing, that court did not explain its refusal to follow that order. Indeed, it did not address the order at all (Pet. App. 18a).[21] This Court has in the past ruled summarily in analogous situations. Cf.

Fritz cannot recover the deregulated price as set forth in the contract because, as FERC held, the structure of the transaction violates Regulation 270.207, Fritz may nevertheless be allowed ultimately to recover a comparable price.

[20] Respondents themselves, in opposing certiorari on several grounds, do not seriously defend the Mississippi Supreme Court's unexplained refusal to address FERC's interpretation of Regulation 270.207. See Br. in Opp. 5-10.

[21] Mississippi law would not appear to bar that court's consideration of the newly-issued FERC decision on Southern's supplemental filing to its petition for rehearing. See *Hathorn* v. *Lovorn*, 457 U.S. 255, 263-264 & n.14 (1982) (surveying decisions of Mississippi Supreme Court and concluding that the court does not consistently refuse to consider issues first raised on rehearing).

Bureau of Economic Analysis v. *Long*, 454 U.S. 934 (1981) (summary consideration ordered in light of recent federal statute); *Alabama* v. *Ritter*, 454 U.S. 885 (1981) (same in light of recent state court decision).[22]

Nor do we think that the pendency of proceedings in the Fifth Circuit to review the validity of FERC's declaratory order militates against summary disposition. In the Fifth Circuit proceedings, both Southern and Fritz have raised substantive challenges to FERC's declaratory order, which include whether FERC has statutory authority to promulgate Regulation 270.207, and whether the Commission properly construed its regulation as prohibiting Southern from paying the contract price. On remand, the Mississippi Supreme Court would be free to hold the case pending a decision by the Fifth Circuit. If the Fifth Circuit overturns FERC's order, then the basis for Southern's federal defense would disappear, and the Mississippi Supreme Court could rule accordingly. On the other hand, if the Fifth Circuit affirms FERC's ruling in its entirety, then the Mississippi Supreme Court would presumably vacate its previous decision.[23]

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[22] Under 15 U.S.C. 717r, the United States Courts of Appeals have exclusive jurisdiction to review the validity of orders entered by FERC, including the declaratory order entered in *Southern Natural Gas Co., supra*. One advantage of vacating and remanding the judgment of the Mississippi Supreme Court is that this would eliminate any possible argument that the parties to the state court proceedings are collaterally estopped from challenging or defending FERC's order in the Fifth Circuit.

[23] A third possibility is that the Fifth Circuit may vacate FERC's order and remand the case for further proceedings before the Commission. In that event, the Mississippi Supreme Court would have to determine whether to defer its reconsideration pending the outcome of the Commission's proceedings.

4. If the Court is disinclined to grant, vacate and remand for further consideration in light of FERC's declaratory order, then we think the proper disposition would be either to hold the petition pending the Fifth Circuit's decision in *Fritz* v. *FERC*,[24] or simply to deny the petition now. As noted above, the petition does not itself present any important and unresolved question of federal law. And although the decision of the Mississippi Supreme Court creates the possibility that petitioner will be subject to conflicting state and federal judgments, we have previously noted several factors suggesting that the potential for such a conflict, in the context of this case in its present posture, does not independently warrant this Court's attention.

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[24] If the Court chooses to hold the petition pending the result of *Fritz* v. *FERC*, No. 88-4410 (5th Cir.), we will promptly submit our views as to the appropriate disposition of the petition once the court of appeals issues its decision.

CONCLUSION

We recommend that the Court grant the petition, vacate the judgment, and remand the case for further consideration in light of FERC's declaratory order in *Southern Natural Gas Co.*, 40 F.E.R.C. ¶ 61,225 (1987), reh'g denied, 43 F.E.R.C. ¶ 61,454 (1988). Should the Court be disinclined to order summary disposition, the petition for a writ of certiorari should either be denied or held pending the result of *Fritz* v. *FERC*, No. 88-4410 (5th Cir.).

Respectfully submitted.

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